SUPREME COURT OF NOVA SCOTIA
Citation: R v. W.H.A., 2011 NSSC 156

Date: 20110421
Docket: CR Ant. 336695
Registry: Antigonish

Between:

Her Majesty The Queen

v.

W. H. A.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: s. 468.4 of the *Criminal Code*

Judge: The Honourable Justice Peter P. Rosinski.

Heard: April 15, 2011, in Antigonish, Nova Scotia

Written Decision: April 21, 2011

Counsel: Catherine Ashley, for the Provincial Crown
Coline Morrow, for the Accused

By the Court:

Introduction

[1] Mr. A. faces a jury trial in which he is alleged to have sexually assaulted K.F., and simultaneously been in breach of an undertaking with conditions to keep the peace and be of good behaviour; and also that he failed to abstain from the possession and consumption of alcohol. He seeks severance of the breach of undertaking charges pursuant to s. 591 of the *Criminal Code*.

Background

[2] Mr. A. was charged on an information sworn January 26, 2010, that he did commit offences, all at the same place and time as follows:

1. s. 271(1) of the *Criminal Code* (sexual assault) on K.F., a female.

2. s. 271(1) of the *Criminal Code* (sexual assault) on K.F., a female.

3. s. 145(3) of the *Criminal Code* (breach of undertaking - fail to keep the peace...)

4. s. 145(3) of the *Criminal Code* (breach of undertaking - not to possess or consume alcohol)

5. s. 733.1 of the *Criminal Code* (breach of probation order dated August 20, 2009 - fail to keep the peace...)

6. s. 173(1)(b) of the *Criminal Code* - indecent act toward K.F. (exposing his genital organs)

[3] On these 6 counts, the Crown elected to proceed by indictment on counts 1 - 5. The s. 173 offence is summary conviction in all cases.

[4] Mr. A. elected trial by Judge and Jury on counts 1, 2, 3, and 4. Counts 5 and 6 are within the absolute jurisdiction of the summary conviction Court: i.e. the Provincial Court - s. 553(c)(ix) of the *Criminal Code*; and s. 798 and 804 of the *Criminal Code*.

[5] The allegations underlying these charges are as follows (taken from the Crown brief of expected evidence):

ALLEDGED FACTS

On March 10, 2009, W. A. entered into an undertaking before a Judge with respect to two allegations, namely assault causing bodily harm contrary to section 267(b) and fail to comply with a condition contrary to section 145(5.1) of the *Criminal Code*. Two conditions of the undertaking specified that W. H. A. was to:

1. Keep the peace and be of good behaviour, and

2. Not possess or consume alcoholic beverages.

On October 19, 2009, Mr. A. was found guilty of assault causing bodily harm; the fail to comply with a condition allegation was dismissed. Sentencing was adjourned on that date, and on three subsequent dates, and Mr. A. was finally sentenced on January 27, 2010, to nine months custody and 18 months probation.

On January 21, 2010, K.F. attended at the residence of Mr. A.. Mr. A. is married to K.F.'s cousin , C. A.. At the time, K.F. was 17 years old and in grade 12. K.F. had an argument with her mother, was angry, and wanted to have cooling off period, so she attended at her cousin's house to ask if she could stay the night. Mr. A. was alone at the residence when K.F. arrived.

K.F. proceed to make herself something to eat. While so doing, Mr. A. asked K.F. if he could have a hug. K.F. gave Mr. A. permission to hug her. While so hugging her, Mr. A. pulled K.F. close to his body and thrust his pelvis against her body. This made K.F. very uncomfortable.

K.F. and Mr. A. went downstairs in the residence and Mr. A. asked K.F. if she "got her first dick before?" and told her that he remembers when he "got his first pussy." Mr. A. then removed his pants and started masturbating. Mr. A. tried to get K.F. to masturbate him. Mr. A. asked K.F. if "she wanted to suck him?". Mr. A. continually tried to have K.F. watch him as he masturbated, despite her saying "No, put it away." Mr. A. eventually ejaculated into a bandana.

> Sometime thereafter, C. A. returned home with the couple's children. Mr. A. proceeded to wink at K.F. and lick his lips while looking at K.F. Mr. A. also took his hand and rubbed it between K.F.'s legs, on the outside of her clothes, and stroked her vaginal area back towards her buttocks. Mr. A. would do these things when his wife was either out of the room, or distracted dealing with the children.
>
> Later in the evening sometime between 7:00 and 8:00 pm, when the children were sleeping, Mr. A., Ms. A. and K.F. went to the basement to watch television. Mr. A. was drinking shot beer and offered one to K.F., which she accepted and drank. At the time Ms. A. was pregnant so she did not consume any beer. The three did however share five joints of marijuana. In total, K.F. witnessed Mr. A. consume five or six beer.
>
> Between 12:00 and 1:00 am, Mr. A. and Ms. A., and K.F. went to bed. K.F. stayed in the basement where she went to sleep on the coach, and Mr. A. and Ms. A. went upstairs.
>
> Several hours later, Mr. A. returned to the basement where K.F. was sleeping. Mr. A. tried to remove K.F.'s pants and she tried to keep them up. Mr. A. overpowered K.F., removed her pants, and then pulled his underwear down. Mr. A. then put his penis into K.F.'s vagina and had forced sexual intercourse with her. K.F. repeatedly told Mr. A. not to touch her. Mr. A. did not wear a condom.

[6] Counts 5 and 6 were continued in Provincial Court, and are next to be addressed on May 11, 2011 to set a trial date.

[7] After a preliminary inquiry was held on September 24, 2010, Mr. A. was committed to stand trial by Judge and Jury on counts 1 - 4. The trial is set to begin April 26, 2011.

Defence Position

[8] Mr. A. argues that there be an order "for severance of the counts". His argument suggests severing the counts as follows:

> Counts 1 and 2 be tried together (sexual assaults)
>
> Counts 3 and 4 be tried together (breaches of undertaking)

[9] The suggested reasons for this organization of the charges is:

> 1. Mr. A. will want to testify (if he does at all) on the "breach" charges, but not necessarily on the sexual assault charges.
>
> 2. A jury, even properly warned and instructed about the use it may make of the 2 breach charges, may still find that, the sheer number of charges; the multiple breach charges; arising from an undertaking (suggesting another outstanding charge); and one alleging that he is not to possess or consume alcohol being suggestive that he is one to

"do as he pleases" regardless of even Court Orders; cumulatively make his right to a fair trial in this case questionable.

Crown Position

[10] The Crown responds that the 4 counts should remain together on one Indictment as they presently are because:

1. A multiplicity of proceedings should be avoided except in exceptional circumstances.

2. In this case, the allegations are straightforward and a jury is presumed to act according to the instructions on the law they receive, and the instructions they would require in this case for the "breach" charges are not a significant additional burden on the Court or the Jurors.

3. The evidence regarding all 4 counts will primarily come from the same witness i.e., K.F., the complainant, and moreover, she should not have to endure testifying against Mr. A. more than once, unless it becomes absolutely necessary to do so.

4. Any significant prejudice to Mr. A.'s right to have a fair trial which would flow from the jury being aware that Mr. A. was charged with other offences and that he likely violated a Court Order (the undertaking) can be neutralized with standard jury warnings and instructions.

5. 2 trial processes could result in inconsistent verdicts (assuming that the proof of the failure to keep the peace charge required a second showing of proof beyond a reasonable doubt that Mr. A. committed a sexual assault(s)).

The Law

[11] A discretionary decision to sever counts should only be made where "the interests of justice so require" - s. 591(3) of the *Criminal Code*.

[12] The starting point is that the Crown is entitled to present its allegations as it sees fit. Courts must have serious reasons to interfere with the Crown's discretion and should not lightly do so.

[13] The case law establishes that the burden to satisfy a Court that it should intervene is on the Applicant. In applications to sever counts from an Indictment, the following factors are commonly considered:

> 1. The general prejudice to the fair trial rights of the Accused
>
> 2. The legal and factual nexus between the counts.
>
> 3. The complexity of the evidence
>
> 4. Whether there is an "objectively justifiable intent" to testify on some counts but not others by the Accused.
>
> 5. The possibility of inconsistent verdicts.
>
> 6. The desire to avoid a multiplicity of proceedings.
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> 7. The use of similar fact evidence at the trial.
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> 8. The length of the trial having regard to the evidence to be called.
>
> 9. The potential prejudice to the Accused with respect to the right to be tried within a reasonable time.
>
> 10. The existence of antagonistic defences as between Co-Accuseds.
>
> Para. 18 - 27 - *R v. Last* 2009 SCC 45 [2009] 3 SCR 146, per Deschamps, J. for the Court.

[14] Deschamps, J. also warned:

> 46 Indeed, if a proper jury instruction were all that was needed to deal with potential prejudice to the accused, then prejudice would in a sense cease to be a relevant factor in the analysis. While a limiting instruction can *limit* the risk of innapropriate cross-pollination or propensity reasoning, courts should not resort to a limiting instruction unless there is a valid reason to do so. As with the accused's intention to testify, the limiting instruction is but one factor in the balance exercise.
>
> 47 As previously stated, all the factors must be considered and weighed cumulatively.

An assessment or balancing of the various relevant factors

[15] Mr. A.'s decision whether to testify or not should not be unduly influenced by a desire to avoid multiplicity of proceedings.

[16] Trials involving allegations of sexual assault generally, and specifically in this case, require an Accused to make a very difficult decision about whether to testify or not. In this case, the Crown does not have eyewitnesses to the sexual assault beyond the complainant herself. It will be a case that turns on the credibility of the complainant, and possibly Mr. A. if he testifies. Mr. A. has indicated that he will wait until the end of the Crown's case before deciding whether to testify.

[17] Notably, a **Corbett** [1988] 1 SCR 670 (Criminal records admissibility) hearing is also expected at the end of the Crown's case. Mr. A. may wish to await the outcome of that application by the Defence before deciding whether to testify.

[18] In these circumstances, I do not consider it fair to place too much weight on the factor whether there is an "objectively justifiable intention to testify" on some counts and not others - Mr. A. has indicated that he will **likely** want to testify on the "breach" charges, but **not necessarily** the sexual assault charges.

[19] In essence, the "breach" charges are incidental - their existence is premised on a Court Order, **and** alleged violation of its conditions by committing another criminal offence and failing to not possess/consume alcohol - see e.g. *R v. C.G.F.* 2003 NSCA 136 (2003) 181 CCC (3d) 422 (NSCA) at paras. 13, 17 - 18 and 53 - 55.

[20] The allegation is that Mr. A. consumed 5 - 6 beer in his home. Such consumption, itself, is not a crime.

[21] The dedication of a separate jury trial for the two breach charges alone would seem to most people to be a poor use of scarce resources; nevertheless, the Crown elected to proceed indictably, and thus must have considered this in making its determination to include the “breach” charges in the Indictment in this case.

[22] On the other hand, would such a jury trial, in the (in my experience) unlikely event that it would proceed, require the complainant to testify again? I do not think so, at least regarding the sexual assault.

[23] More precisely, it would not, because the allegation would be limited to the breach of undertaking charge alleging a failure to keep the peace and be of good behaviour based on the commission of a sexual assault offence. Proof of conviction for sexual assault during the currency of the undertaking in this case, would establish a *prima facie* case for the Crown.

[24] Although in relation to a probation order, yet still considering a breach of the “fail to keep the peace...” condition, the Supreme Court in *R v. Docherty* [1989] 2 SCR 941 made it clear that proof of a conviction for an underlying offence, such as

here, a sexual assault, constitutes the *actus reus* (the prohibited act) of a breach charge. Properly identifying an Accused and satisfying the Court that the person subject to the undertaking is also the identified person in Court, together with tendering an associated Certificate of Conviction (and proof of identity) would *prima facie* prove the *actus reus*.

[25] Upon such proof, the Crown would be in a position to argue that the *mens rea* / guilty mind should be inferred. Notably in relation to a breach of undertaking, Mr. A. would be attempting to establish that he did not fail to comply with the conditions "without lawful excuse" - see *C.G.F.* supra, per Cromwell, JA at para. 55.

[26] On the other hand, whether Mr. A. was in possession of, or consuming alcohol, could be addressed by the Trial Judge, in this jury case, at the time of sentencing. At that time the Judge is entitled to make findings of fact, even about facts that could constitute a separate charge - see s. 725(1)(c) and 724(2) of the *Criminal Code*. That finding could be considered an "aggravating" factor on sentencing Mr. A. on the sexual assaults. In that way, Mr. A. could be held to

account for that breach. Notably, only if Mr. A. is found guilty of the sexual assaults, if tried separately, could this approach be used.

[27] Furthermore, a separate jury trial on the breach charges is not "cast in stone". Pursuant to s. 561(1)(c) and s. 554 of the *Criminal Code,* a Provincial Court Judge with consent, can hear the trial of both of the breach charges. Mr. A. has also confirmed in a letter dated April 14, 2011, that if the counts are severed "my client will agree to your Lordship decide [sic] the remaining charges on the evidence already heard and any other evidence... that the Crown wishes to present to you".

[28] By consent, I could conduct the "trial" of these severed breach of undertaking charges. The parties would have to agree to re-election to Judge alone trial; that the evidence that I heard at the jury trial may properly be considered in wholesale fashion by me, in addition to any other evidence the parties would want to call, including Mr. A. testifying regarding the "alcohol" breach charge. The "keep the peace" breach charge would rise or fall on the jury's decision whether to convict on the sexual assaults. There would be therefore, no opportunity for inconsistent verdicts on the breach (fail to keep peace) and sexual assault charges,

nor a requirement for K.F. to testify a second time. The Crown questioned whether this is procedurally possible and indicated that it would not consent to such a process.

[29] On balance, I am not persuaded that the "multiplicity" of trials is a significant factor in this severance motion.

[30] On the other hand, leaving the two breach charges before the jury, will see them being aware that Mr. A. was facing other criminal charges (unspecified) **and** that he, in spite of an undertaking (which many view as a "court order"), could care less about its conditions.

[31] Moreover, if on the **Corbett** application, the Crown prevails, and evidence of his past criminal record is placed before the jury, there is a very real likelihood that some, if not all, of the jurors may harbour an inappropriate level of mistrust of Mr. A.'s position (and possibly his evidence) in making full answer and defence.

Conclusion

[32] I am satisfied that the potential prejudice to Mr. A.'s fair trial rights (the freedom to decide to testify only on some charges **and** the danger of impermissible "propensity to commit crime" reasoning) as contrasted with an insignificant concern about multiplicity of proceedings, allows me to conclude that it is in the interests of justice to sever the two counts alleging breaches of the undertaking from the two counts of sexual assault and I so order.

J.